

Gu (Migration) [2021] AATA 1114 (10 March 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Xianting Gu
VISA APPLICANT:	Mohamad Hassan
CASE NUMBER:	1808537
DIBP REFERENCE(S):	BCC2016/818223
MEMBER:	T. Quinn
DATE OF ORAL DECISION:	10 March 2021
DATE OF WRITTEN STATEMENT:	13 March 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • Clauses 309.211 and 309.221 of Schedule 2 to the Regulations

Statement made on 13 March 2021 at 11:34am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and ongoing married relationship – extensive international travel for family visits – limited sharing of financial resources – evidence of regular communication – language learning – prospective employment – plans for a family – social recognition of the relationship – companionship and emotional support – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

Minister for Immigration & Multicultural Affairs v Lay Lat [2006] FCAFC 61

Minister for Immigration and Border Protection v Angkawijaya [2016] FCAFC 5

Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham [2000] 168 ALR 407

Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal) [1994] FCA 1105

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 March 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under section 65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 February 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy clause 309.211 of the Regulations because the delegate was not satisfied that the review and visa applicants were in a married relationship as defined by section 5F of the Act.
4. The review applicant appeared before the Tribunal on 10 March 2021 by telephone hearing to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The hearing was conducted with the assistance of an interpreter in the English and Arabic languages.
5. The review applicant was represented in relation to the review by her registered migration agent.
6. It is for the applicants to satisfy the Tribunal that the requirements of the Act and Regulations have been met. The decision maker is not required to make the applicant's case. Whilst the concept of onus of proof does not apply to administrative decision making, the relevant facts of the individual case must be supplied by the applicant(s), in as much detail as necessary to enable the decision maker to properly consider the case that is being put.¹
7. The Tribunal has proceeded to a decision having regard to all the information before it, including the material and evidence provided by the applicant(s) on the day of the hearing.
8. For the following reasons, the Tribunal has concluded that the decision under review ought to be remitted in this case. In reaching its decision, the Tribunal has had regard to:
 - a. the oral evidence given at the hearing;
 - b. all written material filed by or on behalf of the applicant; and
 - c. other relevant documents on the Tribunal and Department files.

9. The Tribunal notes that not all the evidence and material that has been placed before the Tribunal has been specifically referred to in the Tribunal's reasons as set out below. The reasons incorporate reference only to that information that the Tribunal has been found to be fundamental or materially significant to the determination of the issues in the case.

10. STATUTORY AND LEGAL FRAMEWORK

¹*Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61.

11. The issue in this case is whether the applicants are in a married relationship as defined by section 5F of the Act.
12. Clauses 309.211(2) and 309.221 of the Regulations require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is a Chinese born Australian Citizen. Based on the information and evidence before it in the Department and Tribunal files, the Tribunal is satisfied that she is an Australian citizen.
13. 'Spouse' is defined in section 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis.² In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in clause 1.15A(3) of the Regulations are effectively questions which must be answered.³
14. The Tribunal is therefore bound to consider and, to the extent relevant, apply the matters outlined in clause 1.15A(3) of the Regulations (and any other circumstances of the relationship under clause 1.15A(2)) to the applicants' case. Accordingly, the Tribunal has carefully considered same in relation to material before it. The Tribunal, however, recognises that it is an independent statutory body. It must therefore reach its own conclusions as to the merits of the applicant's case, which includes an assessment of how and to what extent each factor of clause 1.15A is relevant and applicable, independently of any conclusions reached by the delegate.
15. Compliance with the prescribed criteria turns on the Tribunal's satisfaction as to whether or not the criteria have been met and not on the objective existence of that fact.⁴ In determining whether it is so satisfied, the Tribunal is not required to uncritically accept any or all of the allegations made by the applicants and it has not done so. A decision maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion by an applicant is not made out.⁵
16. If a decision maker does not believe a particular witness, no detailed reasons need be given as to why that particular witness was not believed the Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepts or rejects individual pieces of evidence.⁶
17. It is for the applicants, in this inquisitorial process, to put whatever evidence or argument they wish to a decision maker in order to enable that decision maker to reach the requisite state of satisfaction.⁷

² Section 5F(2)(aa)-(d).

³ *He v MIBP* [2017] FCAFC 206.

⁴ *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5 at 15.

⁵ *Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal)* [1994] FCA 1105 at [7].

⁶ *Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham* [2000] 168 ALR 407 at [67].

⁷ *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [76].

CONSIDERATION OF CLAIMS AND EVIDENCE

Valid marriage

18. If the applicants are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicants have filed a copy of their Marriage Certificate with the Tribunal on 2 March 2021 which indicates they were married on 4 February 2016 in Lebanon.⁸ On the evidence, the applicants were married to each other under a marriage that is valid for the purposes of the Act as required by section 5F(2)(a).

19. Evidence Generally

20. The applicants have filed hundreds of pages of material in support of their application including, inter alia, copies of photos, correspondence via text and email, evidentiary documents relating to flights and travel. The applicants' evidence was generally consistent. The visa applicant has been living between Lebanon and China since the applicants met in 2015 and the applicants have made arrangements to see each other regularly in Lebanon or China (and once in Malaysia) from the end of 2015 until the end of 2019, shortly after which international travel became very difficult due to the COVID19 Pandemic and associated restrictions. The applicants, at the request of the Tribunal, filed a document summarising the travel they have undertaken to reunite with each other in person between 2015-2019 which included two trips in 2015 and 2016, three trips in 2017, six trips in 2018 and three trips in 2019 with a total of 414 reunion days.⁹ This travel would have been at considerable expense and the Tribunal considers it is strong evidence of a mutual commitment to a shared life.
21. The visa applicant moved to China for 922 days in order to meet his wife's family, learn her language and ensure proximity to her such that the applicants were able to more easily reunite while awaiting the outcome of this proceeding.¹⁰ The applicants gave evidence that the visa applicant has learnt mandarin Chinese and that although they converse in English they are able to communicate in Chinese as well. This is consistent with some of the text messages on the Tribunal file between the parties. The Tribunal considers the visa applicant has made significant changes to his life with the commitment to his wife and her family as a priority which is strong evidence of a mutual commitment to a shared life. The visa applicant is only 26 years of age. He moved to China when he was 22 years of age. This is a drastic change to her personal circumstances – leaving his family and friends in his home country to live in a country with a vastly different culture where he did not know the language, particularly at such a young age, is very persuasive evidence.
22. The review applicant is 51 years of age. When the Tribunal raised this with the applicants, they both indicated that age was no barrier to their bond and commitment to each other. The visa applicant stated 'age is just a number' and the review applicant talked of her previous marriage where she felt she had to be 'perfect' and stated that with the visa applicant she felt she was free and could be herself in ways that she had not experienced before. The evidence presented as authentic and persuasive, particularly in combination with the videos and photos filed by the applicants of their time in person together. There is considerable evidence on the file from the applicants and the review applicant's adult daughter suggesting that the review applicant was undergoing personal and emotional difficulties following her divorce in 2014 from her previous husband of twenty years and that the visa applicant and her relationship with him has made and continues to make a significant impact on her emotional wellbeing.

⁸ See Tribunal file, document ID 8168087.

⁹ See Tribunal file, document ID 8192909.

¹⁰ See Tribunal file, document ID 8192909 and evidence at hearing.

Financial aspects of the Relationship

23. The applicants' evidence in relation to the visa applicant's work was not entirely consistent. The visa applicant stated he was working in demolition and taught English when he lived in China. The review applicant gave evidence that her husband works as a plumber but since the COVID19 Pandemic had found it difficult to secure work so was trying to buy and resell used cars. The review applicant did state that the visa applicant taught English in China.
24. The applicants' evidence in relation to the review applicant's work in real estate was relatively consistent. The review applicant is living in an investment property at the moment and the evidence suggests she is comfortable financially. The applicants gave consistent evidence about their plans for the visa applicant upon arrival in Australia and this was supported by the correspondence between the parties on the Tribunal file: the visa applicant will work as an uber driver to earn enough money to complete a vocational plumbing qualification and the review applicant will then assist him securing work and starting his business through her own real estate/investment/ development business. The evidence was consistent and plausible in relation to the applicant's future financial plans and their thorough discussion of same. In this regard the applicant's verbal and documentary evidence on file also indicated that the applicants plan to live together when the visa applicant arrives and look to buy a house for their future together. The visa applicant seemed to think the review applicant's daughter would live with them, but the review applicant gave evidence that her daughter is independent now and would not be living with them.
25. The applicants gave oral and documentary evidence demonstrating a sharing of expenses for their trips together and the visa applicant's rental costs in China.
26. The Tribunal finds no evidence that the parties have pooled their financial resources in a substantive way or in relation to major financial commitments. The Tribunal finds no evidence of any joint ownership of real estate or other major assets or any joint liabilities.
27. The Tribunal accords some weight to the financial aspects of the relationship given the matters above, but such weight is necessarily limited given the parties are residing in separate countries and their inconsistent evidence in some aspects of this factor for consideration.

28. Nature of the Household

29. The review applicant is divorced and has daughter who is in her twenties. The visa applicant has never been married and there is no evidence that he has any children or that the applicants have children together.
30. The applicants have filed considerable varied evidence indicating they are in regular communication about day to day events. Whilst the visa applicant appeared to have some misunderstandings about future household arrangements with the review applicant's daughter, the applicants were consistent with their desire to live together, buy a house, work together and try for a baby. They gave evidence that they had already been trying to conceive but their limited time together and the stress seemed to have impacted this. Both applicants seemed confident that this was an option despite the review applicant's age and the review applicant referred to her physical health in support of this at hearing. Both applicants also indicated that if they could not conceive, they would look at adopting but the crux of their evidence seemed to be that their priority was to be together.
31. The applicants gave evidence that they speak daily. The visa applicant was aware of the review applicant's badminton pursuits and knew considerable detail about her daughter and the stage of life her daughter is currently in with her study and future career goals.

Documents on the file also reflect travel together as a family unit and correspondence between the visa applicant and the review applicant's daughter.

32. The applicants also filed videos of their households with the Tribunal which included specific footage of the place in the review applicant's wardrobe reserved for the visa applicant's clothes and multiple framed photos of their wedding and travels together.
33. The applicants gave consistent evidence that the visa applicant stayed with the review applicant's family briefly to visit them but rented his own place (which they shared the cost of) because he did not want to intrude on the space that the review applicant's mother and brother were living in and wanted some privacy.
34. The Tribunal is particularly persuaded by the applicants' multiple trips to see each other in person as set out above and accords weight accordingly to the household aspects of the relationship.

35. Social Aspects of the Relationship

36. Whether the applicants represent themselves to other people as being married to each other, the opinion of the applicants' friends and acquaintances about the nature of the relationship and any basis on which the applicants plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
37. The applicants gave consistent evidence that they exchanged, and both wear, their wedding rings. The photos and footage filed corroborated this, including the aforementioned photos of their wedding and trips together framed in both houses.
38. They gave consistent evidence about the location and attendees at their wedding. The Tribunal is troubled by the fact that none of the review applicant's family attended the wedding, even her daughter was not present. This seems very unusual and raises some concerns about the nature of the arrangements, particularly given it occurred so soon after they had met and only weeks after their first meeting in person. However, the visa applicant gave evidence that the review applicant's family considered that the review applicant had been married before and she was now an adult and they did not need to attend and that all his step daughter cared about was her mother's happiness.
39. The Tribunal expressed concern with both applicants at hearing about the way in which they met and the circumstances surrounding the visa applicant and his family's migration history. The visa applicant is one of three Lebanese siblings who have married Chinese born Australian Citizens who are work associates. On the face of this information, the Tribunal was concerned about the true nature of the applicants' intentions in seeking this visa. Both parties simply stated in evidence that they met through the visa applicant's brother and his wife ("Lucy") who works with the review applicant. The visa applicant gave evidence that when his brother married Lucy, he returned to Lebanon and told the visa applicant about the positive qualities of Chinese women. The visa applicant gave evidence he was influenced by this and then when he met the review applicant agreed with his brother. The applicants gave consistent evidence that it appears that Lucy and the visa applicant's brother are now estranged, and the visa applicant's brother is now living in Canada. Their evidence was somewhat vague in this regard and the Tribunal formed the view that there was more information about this situation which the applicants were not being forthright in relation to. The review applicant gave evidence that the visa applicant's sister, however, married another of the review applicant's work colleagues ("KK") and has gone on to have twins with him who are now two years old (and who are Australian citizens) and has recently succeeded before this Tribunal in relation to her partnership visa application.

40. As stated above, the visa applicant has embraced the review applicant's family – both in China and her daughter in Australia – with enthusiasm, including living in China for nearly three years cumulatively. There are many photos on file of the applicants with the review applicant's family and some with the visa applicant's family. The majority of these photos present as authentic and do not appear to be staged.
41. The Department file contains several statements from friends and relatives supporting the applicants' genuine relationship, including from the review applicant's daughter.
42. The Tribunal has given some weight to the social aspects of the relationship.

43. Nature of the applicants' commitment to each other

44. The duration of the relationship, the length of time during which the applicants have lived together, the degree of companionship and emotional support that the applicants draw from each other and whether the applicants see the relationship as a long term one are all aspects to be considered in determining the nature of the applicants' commitment to each other.
45. The applicants have now been married for in excess of five years. They have supplied a significant number of text messages, emails, photos and videos and gave consistent evidence at hearing which demonstrate a considerable level of mutual commitment to each other and their shared life tighter with deep expressions of love and discussions of practical realities about their future life together.
46. The applicants gave evidence that they speak daily. Their many trips to reunite as stated above, their photos and videos, text messages and emails on the Tribunal file reflect a love and commitment to each other that appeared authentic. The Tribunal refers to and repeats the detail of the visa applicant's steps to be closer to his wife and her family in relation to his move to China which is a significant aspect to consider in relation to this factor of the Tribunal's consideration.
47. It seems to the Tribunal that the degree of companionship and emotional support these spouses are giving to each other suggest a genuine and continuing relationship.
48. The Tribunal has given considerable weight to the degree of the applicants' commitment to each other on the basis of the evidence before it.

49. CONCLUSIONS

50. The Tribunal has carefully considered all of the material and evidence before it, including the duration of the relationship, the financial aspects of the relationship, the social aspects of the relationship, the nature of the household and the degree of companionship and emotional support the applicants draw from each other.
51. Having regard to all of the circumstances of the relationship and the evidence before it taken as a whole, the Tribunal is satisfied that at the time of application and the time of this decision, the applicants have a mutual commitment to a shared life to the exclusion of others and that their relationship is genuine and continuing.
52. The Tribunal has considered the circumstances of the relationship as set out in Rule 1.15A(3) and is satisfied on the evidence that the relationship meets the requirements for a married relationship as required by section 5F(2)(b)-(d) of the Act at both the time of the application and the time of decision.

53. On the basis of the above, the Tribunal is satisfied that the requirements of section 5F(2) of the Act are met at the time the visa application was made and at the time of this decision.
54. Therefore, the visa applicant meets the requirements of clauses 309.211 and 309.221 of the Regulations.
55. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to considering the remaining criteria for a Subclass 309 visa.

DECISION

56. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: Clauses 309.211 and 309.221 of Schedule 2 to the Regulations.

T. Quinn
Member

57.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).